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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1930.

No. 129.

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

against

SYBIL WHITEHOUSE,
Respondent.

BRIEF ON BEHALF OF RESPONDENT.

JOHN W. DAVIS,
SPOTSWOOD D. BOWERS,
15 Broad Street,
New York City,
Attorneys for Respondent.

MARSDEN B. CANDLER,
Of Counsel.

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BRIEF ON BEHALF OF RESPONDENT.

Statement of the Case.

This case originated as an appeal by the respondent to the United States Board of Tax Appeals from a determination by the Commissioner of Internal Revenue of a deficiency in her Federal income taxes for the calendar year 1921 in the amount of $920.79 (R. 3). The Board found that no deficiency existed (R. 27) and the Commissioner appealed from that decision to the Circuit Court of Appeals for the First Circuit (R. 22). The Circuit Court affirmed the decision of the Board (R. 42). The case comes before this Court on a writ of certiorari issued in accordance with the order entered on October 13, 1930 (R. 42), granting the petition that had been filed on May 17, 1930.

Statement of Facts.

James Gordon Bennett, a citizen of the United States and a resident of New York State, died testate in France on May 24, 1918 (R. 10). In his will he bequeathed annuities to a

number of individuals, including the respondent. The terms of the will relating to the respondent's annuity are as follows (R. 10, 29):

> "Tenth. I also give and bequeath to the said Sybil Douglas, wife of William Whitehouse, an annuity of five thousand dollars.
>
> • • • • • • • •
>
> All the above annuities mentioned in paragraphs ten to twenty-five of this my will shall be paid in equal semi-annual payments, reckoning from the time of my death."

The will did not in terms direct whether the annuities should be paid out of principal or income.

The executors were authorized and empowered in their discretion to sell, mortgage, lease or exchange any real or personal property of the testator's estate for the purpose of paying any legacies, debts or annuities. They were also authorized and empowered to retain and hold any personal property of the estate to provide for the payment and satisfaction of any annuity given by him (R. 13, 32).

In the 29th paragraph of his will the testator directed the executors "as soon as practicable" after his death "and during the lives of Isaac Bell and James Gordon Douglas and the life of the longest liver of them", to cause to be incorporated a charitable institution to be named "The James Gordon Bennett Memorial Home for New York Journalists" as a perpetual memorial to his father, the founder of the New York Herald (R. 11, 30). The objects and purposes of this corporation were to provide and maintain a suitable and comfortable home or to provide pecuniary aid for persons who had been employed by newspapers regularly published in the Borough of Manhattan, in the City of New York, and who were in need of such assistance (R. 11, 30). The testator devised and bequeathed the entire residue of his estate to the corporation to be formed "when and as soon as the same shall be duly incorporated" (R. 12, 31). All of the income of the residuary estate accruing during the interval between the testator's death and the incorporation of the Home, the

testator bequeathed absolutely to his friends Eugene Higgins, Rodman Wanamaker and James Stillman, and to such of them as should survive him (R. 12, 31). These individuals were also named as executors.

The James Gordon Bennett Memorial Home for New York Journalists Corporation was organized under the laws of New York in May, 1919 (R. 27). As shown by their account of settlement, on December 30, 1920 the executors permanently set aside to the Home Corporation the residuary legatee and devisee, securities valued at $3,133,260, which, however, remained subject to the payment of taxes, annuities or any other charges (R. 14).

The respondent's annuity and other annuities were paid by the executors out of the corpus of the estate until November 14, 1920. On and after that date they were paid out of the income of the estate (R. 13). The Government did not undertake to tax the annuities in the years when they were paid out of corpus.

The Question Presented.

The question presented is whether or not the annuity payments made to the respondent in 1921 constitute taxable income to her under the Revenue Act of 1921.

The Statutes Involved.

The statutes involved are set out in the Appendix (*post*, pp. 30-33).

Summary of Argument.

I. Under the terms of the will the respondent had no right to receive income as such; she had the right to receive the sum of $5,000 per year in semi-annual instalments, no more and no less, payable in any event, which constituted a charge upon the residuary estate of the decedent. *Ex parte McComb*, 4 Bradf. 151; *Pierrepont* v. *Edwards*, 25 N. Y.

128; *Kearney* v. *Cruikshank*, 117 N. Y. 95, 100; *Clark* v. *Clark*, 147 N. Y. 639; *Buchanan* v. *Little*, 154 N. Y. 147; *Peoples Trust Co.* v. *Flynn*, 188 N. Y. 385; *Peck* v. *Kinney* (C. C. A. 2nd), 143 Fed. 76, 80; *Matter of Toms*, 84 Misc. 312, 318; *Matter of Hodges*, 128 Misc. 211, 213. The respondent did not receive a bequest of income or income from a bequest such as this Court considered in the cases of *Irwin* v. *Gavit*, 268 U. S. 161, and *Beatty* v. *Heiner*, 276 U. S. 598. The annuity payments were not payments of income produced by a fund or corpus set aside in trust for her benefit pursuant to the testator's direction. No trust was contemplated by the will, none was set up by the executors, and under the law of New York the creation of a trust would not have been permitted. *Clark* v. *Clark*, 147 N. Y. 639. The annuity payments of $5,000 per year are in all material respects indistinguishable from payments on account of a general legacy of a sum certain. *Ex parte McComb*, 4 Bradf. 151, 153; *Matter of Hodges*, 128 Misc. 211, 213; *Reid* v. *Brown*, 54 Misc. 481; *Matter of Cole*, 174 App. Div. 534, aff'd 219 N. Y. 435; *Bertuch's Will*, 225 App. Div. 773.

II. The payments received by the respondent in 1921 are clearly excluded from gross income by the provision of Section 213(b) (3) of the Revenue Act of 1921, which excludes the "value of property acquired by gift, bequest, devise or descent". Section 213(b) is not a provision for exemption to be strictly construed against the taxpayer. *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189; *United States* v. *Merriam*, 263 U. S. 179, 188. It merely defines what is not taxable income and should be construed liberally, in favor of the taxpayer. *Gould* v. *Gould*, 245 U. S. 151.

Section 219 of the Act of 1921 neither permits nor requires the taxation of this bequest to the annuitant merely because the executor paid the installments due in 1921 out of income that had come into his hands. Section 219 requires an executor to report and pay the tax upon income received by

him but permits him to deduct, in computing the net taxable income of the estate, "the amount of any income properly paid or credited to any legatee" and in such case requires that there shall be taxed to the legatee the income of the estate so deducted "which, pursuant to the instrument or order governing distribution" is distributed to the legatee. The amount so deductible by the executor and taxable to the legatee of necessity includes only income paid pursuant to provisions of the will requiring the payment of income as such. Otherwise, the payment of any general legacy out of income would result in the taxation of such legacies as income to the beneficiary and would nullify Section 213(b)(3) in many cases. *Heywood* v. *Commissioner*, 11 B. T. A. 29; *Tyler* v. *Commissioner*, 9 B. T. A. 255. Yet the Government argues here, contrary to its position in those cases, that a payment to a legatee is income to him merely because it was made out of the income of the estate.

The exclusion of these annuity payments from taxable income in the hands of the annuitants does not result in the escape from taxation of income intended by Congress to be taxed. As the Board of Tax Appeals held in the *Heywood* and *Tyler* cases, *supra*, the executor, in the return filed for the estate, is not entitled under Section 219 to deduct these payments, although made from income, because they were not distributions of income *as income* under the terms of the will. The sums so paid would have been taxable to the executor were it not for the fact that they happened to be paid from income derived from the securities which had been permanently set aside for the Home, which is an exempt organization under Section 231 (6) of the Revenue Act of 1921. That income is tax free not because the respondent is not subject to taxation on the annuity payments, but because Congress has exempted from taxation the income of charitable corporations. *United States* v. *Bolster* (C. C. A. 1st), 26 F. (2d) 760, 763.

III. The taxation of the annuity payments to the respondent under Section 219 would result in the imposition of an income

tax as well as an estate tax on their value, for the value of this and other annuities was necessarily included in the computation of that part of the estate not bequeathed to charity which was subject to the estate tax provisions of the Revenue Act of 1916. *Edwards* v. *Slocum*, 287 Fed. 651; aff'd, 264 U. S. 61. Such double taxation is not to be presumed in the absence of a clearly expressed intention of Congress to that end. *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189, 195.

ARGUMENT.

I.

The respondent's annuity is neither income from a bequest nor a bequest of income; it is an unqualified right in the nature of a general legacy to receive $5,000 a year out of the residuary estate secured by a lien thereon; it is not a right to receive income as such.

The testator died a resident of New York (R. 10) and the law of New York State therefore governs the construction of his will and the rights acquired thereunder. *Harrison* v. *Nixon*, 9 Peters 483, 504. It is elementary that the rights of the object of a testator's bounty are to be determined in accordance with the intention of the testator, as indicated by the provisions of his will, read as a whole. *Colton* v. *Colton*, 127 U. S. 300, 310; *Chrystie* v. *Phyfe*, 19 N. Y. 344, 348; *Herzog* v. *Title Guarantee & Trust Co.*, 177 N. Y. 86, 92.

By the tenth paragraph of his will the testator bequeathed to the respondent "an annuity of five thousand dollars"—an unqualified right to receive $5000 per annum—"in equal semi-annual payments, reckoning from the time of my death" (R. 10). He gave to his executors, for the purpose of carrying out the administration of his estate, the power to sell, mortgage, lease or exchange any and all property of his estate (R. 13). He recognized, however, that

the annuities would constitute a charge or lien upon the assets of his estate and, in order to complete the executors' power of sale he therefore directed that "any and all property so sold, conveyed, assigned, mortgaged, leased or exchanged shall be free from any lien or charge by reason of any devise, bequest or annuity". He further authorized the executors "to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me".

It is to be observed that the testator did not direct that the respondent's annuity or any other annuity be paid out of the income of the estate. Nor did he direct that a trust be set up, the income of which was to be applied to the payment of the annuities. He did not give to the respondent or to any other annuitant an interest in any specific property of the estate, nor did he give to any of them the right to receive the income derived from any specific property of the estate. He did give to each annuitant the right to receive a sum certain, payable semi-annually for life, but the rights of the annuitants are not traceable to any particular property or income. They constitute a general charge or lien upon the corpus of the estate. *Clark* v. *Clark*, 147 N. Y. 639; *Buchanan* v. *Little*, 154 N. Y. 152; *People's Trust Company* v. *Flynn*, 188 N. Y. 385.

The testator did not intend that the respondent's annuity or any other annuity be paid primarily out of the income of the estate. On the contrary, his bequest to the executors of the entire income of the residuary estate during the interval between his death and the incorporation of the Home (R. 31), clearly shows that it was his intention that the income of his estate be applied primarily to uses other than the payment of the annuities. The annuitants were sufficiently secured by their general charge on the corpus and the testator undoubtedly intended that upon the incorporation of the Home the income be applied, so far as was necessary, to defray the expenses of its operation. At page 13 of its brief the Government says that it was undoubtedly

the intention of the testator that the respondent's annuity be paid from income "for the reason that he made a complete disposition of the corpus of his estate by the provision for establishing a charitable corporation". This statement is plainly inaccurate, for the testator in the 29th paragraph of his will bequeathed to the Home not the *corpus* of his estate, but the *residue*, and there is nothing in that paragraph nor in any other provision of the will which could fairly be said to support the assertion that he intended that the annuities be paid out of income.

The cases cited at pages 13 and 14 of the Government's brief to support the general proposition that annuities are payable primarily out of income were all cases wherein the court found by construction of the will that the testator intended that the annuities be so paid. *Delaney* v. *Van Aulen*, 84 N. Y. 16; *Matter of Kohler*, 193 App. Div. 8; *Cummings* v. *Cummings*, 146 Mass. 501. Unlike the wills before the courts in those cases, the will in the case at bar is not only not susceptible of a construction that the annuities be paid primarily out of income, but it clearly shows that the testator intended that the income be applied to other uses.

The annuitants had no right to demand that their annuities be paid out of income, nor were they limited to income for such payment. In point of fact the annuities were paid out of corpus until November 14, 1920 (R. 13). The payments made out of income thereafter, were so made, we infer, because there was sufficient income available after the payment of the expenses of operating the Home, and because it is customary in the administration of an estate to pay current obligations out of income to the extent that it is available. While we do not question the propriety of the annuity payments after November 14, 1920, we submit that the respondent under the terms of the will had no greater right to demand that her annuity be paid out of the income of the estate than an ordinary creditor, either of the testator or of the estate itself. She plainly was given no right to receive income as such under the will and whether the executors chose to pay her annuity out of income

or principal, that fact did not concern her, nor did it alter her rights in any way.

The action of the executors in setting aside, in 1920, the assets in their hands as the property of the Home Corporation, but retaining the control over such assets as security for the payment of the annuities and other obligations, did not create any trust, nor any new rights in the annuitants, nor did it deprive them of any rights which they already had. In pursuance of the testator's direction those assets were permanently set aside for the benefit of the residuary legatee, and the lien securing the payment of the annuities, as well as the obligation to pay them out of the assets of the estate, remained unchanged. The provisions of the will completely negative any intention that a trust be created to secure the payment of the annuities; no trust was actually created, and none was necessary. Indeed, if the executors had attempted to create a trust of the residuary estate to produce income with which to pay the annuities, the Home Corporation could have prevented such action. (See *Clark* v. *Clark*, 147 N. Y. 639.)

It is suggested in the Government's brief at page 21 that the period of administration may have ended prior to 1921, no doubt for the purpose of implying that a trust existed in 1921. There is no warrant whatever for the suggestion or implication. On the contrary, it is elementary that the period of administration continues until all legacies, including annuities, are paid, and throughout such period the executor continues to function as executor. As was said in *Clark* v. *Clark*, *supra* (p. 644):

> "* * * All that we find is a legacy of an annuity and a duty of paying it imposed upon executors, a duty which they were perfectly able to perform by force of their official character, as they were situated when the will took effect. As there was no need to arm them with any additional power emanating from the testator, so none was created, and they were left as executors to pay the annuity to the legatee. That legatee of course took no life estate in the property held by the executors,

as the appellant further contends, but simply held the right to be paid the annuity out of the assets in their hands."

Furthermore, the elements of an express trust, namely, a trustee, an estate bequeathed or devised to him, and a beneficiary, do not exist in the instant case. See *Greene* v. *Greene*, 125 N. Y. 507, 510. None of the cases cited by the Government at page 21 of its brief support the assertion that a trust existed in the case at bar. In fact, *Matter of Slocum*, 169 N. Y. 153, there cited, plainly holds that where, as here, the testator did not direct that the estate be divided into separate funds or trusts, the executors cannot be regarded as true trustees and are not entitled to double commissions.

At pages 18 and 19 of its brief the Government suggests that in the year 1921 the annuities were paid from a particular fund established for that particular purpose. There is no support in the record for such an assertion. While it is true that the assets which were set aside to the Home Corporation in 1920 were subject to the charge of the annuities, those assets had not been specifically appropriated by the executors for the purpose of producing income with which to pay the annuities to the exclusion of the other obligations of the estate. The income of those securities might be applied by the executors for the purposes of the Home Corporation or for the purpose of paying taxes or any other obligation of the estate. With respect to that income the annuitants had no preferential right over any other legatees or creditors of the estate.

Again at pages 9 and 12 the Government asserts that the residuary estate was large enough to produce income sufficient to satisfy the total annuity payments required by the will. That may or may not be true, but in any event it is immaterial, for the executors were under no duty to apply the income of the residuary estate in the first instance to the payment of the annuities. The assets of the residuary estate, which the executors set aside and held for the Home Corpo-

ration in 1920, were the property of the Home Corporation, subject only to the charge of the annuities and the other obligations of the estate. Certainly the taxability of testamentary annuities does not turn upon the fortuitous circumstance of whether the amount of the annuities bequeathed happens to be larger or smaller than the amount of the income of the estate not otherwise used in any particular year. As the Court below said (R. 40):

> "In administering this testator's estate the first year's income went to his executors; consequently the annuities were properly paid from the corpus of the estate. Then the home was organized, but presumably had few occupants, so that income remained available for at least a large part of the annuities. But if the residue set aside for the home, subject to the annuities, etc., had proved non-income-producing, or if the executors had applied all income received to the use of the home, the corpus of the residue would have had to be charged with the payment of the annuities. It follows that the actual payment of the appellee's annuity from income was merely an incident, probably temporary, of the administration of the estate; it might also be called an accident."

The annuity bequeathed to the respondent herein is not income. It is a right in the nature of a general legacy to receive out of the residuary estate $5000 a year in semi-annual instalments, no more and no less, without regard to whether or not the estate produces income. And corelatively, from the standpoint of the executor, it is an obligation charged upon the residuary estate, to pay to the respondent $5000 a year, in any event, out of the residuary estate. *Ex parte McComb*, 4 Bradf. 151; *Pierrepont* v. *Edwards*, 25 N. Y. 128, 131, *Clark* v. *Clark*, 147 N. Y. 639; *Buchanan* v. *Little*, 154 N. Y. 147; *People's Trust Co.* v. *Flynn*, 188 N. Y. 385; *Peck* v. *Kinney* (C. C. A. 2nd), 143 Fed. 76, 80; *Matter of Toms*, 84 Misc. 312, 318; *Matter of Hodges*, 128 Misc. 211, 213.

In *Ex parte McComb, supra*, the Court said at page 153:

> "Now an annuity of five hundred dollars per annum is nothing more than a legacy of five hundred dollars to be paid at the end of one year, five hundred at the end of the second year, and so on. I can see no greater or better reason for charging such a legacy with taxes and commissions, than a legacy of ten thousand dollars payable at the end of a year."

Sometimes the term "annuity" is loosely used to include (1) purchased annuities, (2) payments from the income of a fund set apart and invested for that purpose, and (3) true testamentary annuities payable in any event and constituting a charge upon the whole estate. With purchased annuities we are not concerned except for purposes of illustration. So-called annuities of the second class mentioned are not true annuities. One who is given merely the income from a fund to be set aside and invested is always limited to the income from such fund and may not go upon corpus for the satisfaction of any payments. Such a beneficiary has a life or terminable interest in the corpus, the earnings of which are *distributable* to him *as income*. The respondent's annuity in the case at bar is not of that character, but falls within the third class, namely, true testamentary annuities. It is clear that such annuities constitute a charge upon the entire estate and that the annuitant does not take a life interest or other terminable interest in any specific property of the estate with the right to the income therefrom. As the Court said in *Matter of Toms*, 84 Misc. 312, 318:

> "Annuities like the one created by this will are simply bequests of certain specific sums payable periodically. They do not possess any of the elements of a trust. Redf. Surr., § 737a; *Matter of Collins*, 144 N. Y. 522; *Reid* v. *Brown*, 54 Misc. Rep. 483."

In *Matter of Hodges*, 128 Misc. 211, 213, the Court said:

> "In the case of annuities, there is no deviation in the authorities upon the proposition that an annuity is not

the income from a fund, but that it is a simple general legacy of a certain and determined sum of money, payable annually, or as the will may direct, and if a fund is established for the payment of the annuity out of the income thereof the balance of the annuity must be made up from other property."

The distinction between a bequest of income and a bequest of an annuity is clearly defined in the authorities collected in *Matter of Gurnee*, 84 Misc. 324, 326:

"Page on Wills (§607) defines an annuity as follows: 'An annuity is a right to the payment of a specified sum of money at stated intervals, usually annually or at aliquot parts of a year.'

Remsen, in his book on the Preparation and Contest of Wills (at p. 145), says: 'An annuity is substantially different from a gift of the income or use of property. An annuity is a fixed amount directed to be paid absolutely and generally without contingency. An income embraces only the net profits after deducting all necessary expenses and charges, and consequently is uncertain in amount.'

The distinction between an annuity and a life tenancy of income is well shown in the case of *Matter of Dewey*, 153 N. Y. 63. 'The bequest to the widow is of the interest upon the sum of $12,000 to be paid to her annually during the period of her natural life. Does the word "interest" mean an annuity or does it mean income? Redfield on the Law of Wills (Part 2, 453, Edition of 1866) says: "It seems to be well settled in the American courts that as a general thing the bequest of the interest on a particular sum will not be construed the same as giving an annuity of the same amount, although payable annually; but it will be regarded simply as the gift of the income or interest of that amount."' See also *Whitson* v. *Whitson*, 53 N. Y. 479.

There is a distinction between income and an annuity. The former embraces only the net profits, after deducting all necessary expenses and charges. The latter is a fixed amount, directed to be paid absolutely and without contingency. *Carr* v. *Bennett*, 3 Dem. 433-442; *Matter of McComb*, 4 Bradf. 151, 152.

> "An annuity is a stated sum per annum, payable annually unless otherwise directed. It is not income or profits, nor indeterminate in amount, varying according to the income or profits, though a certain sum may be provided out of which it is to be payable; and hence, where testator gave a beneficiary the interest upon a certain sum, payable annually, it is not an annuity, but merely an ordinary legacy, for it is not a stated sum, but may be more or less, according to the earnings of the capital, and is merely interest or income. *Booth* v. *Ammerman*, 4 Bradf. 129-133."

This fundamental distinction between a bequest of income as such and a bequest of an annuity, the Government concedes. At page 18 of its brief it says: "It is true that a bequest of income from a particular fund is payable only from income, whereas an annuity is payable in all events, whether there be sufficient income or not, and in that sense is a charge on the corpus of the estate." It then goes on to say, however, that this distinction is one of form rather than substance and should be disregarded. But obviously, the distinction between a right to income as such and a right to a sum certain payable in any event is not formal, nor is it superficial, for it goes to the substantive nature of the recipient's right, and in the last analysis the nature of that right is determinative of the question whether the payments received are income or something else.

The Government further says, at page 18, that "in substance there is no difference between payments which in fact are income, whether required to be paid as such or not". The assertion that the payments in question "in fact are income", if it has any basis at all, must be predicated either upon the fact that the payments are periodic or upon the proposition that a payment is income to the recipient if it is made out of income. No doubt it is either or both of these supposed tests that the Government has in mind when it says at page 13 of its brief that "irrespective of how the local law may regard an annuity, the Revenue Acts have their own criteria that look to certain rather severe tests of liability and exemption".

We earnestly submit that both of these proposed tests are fundamentally unsound. It is obvious that the recipient of a payment does not realize income merely because the payment was made out of the income of the payor. For example, if A repays money borrowed from B from his income, B does not realize income upon the repayment merely because A paid it from his income. Conversely, if A pays a salary to his employee out of capital, the fact that A's capital was depleted by the payment does not prevent the employee from receiving income by way of compensation for services. In short, there is no necessary relation between the source of a payment and its taxability in the hands of a payee; and funds cannot be earmarked as income or capital at their source either for the purpose of permitting the recipient to escape a tax or for the purpose of permitting the Government to impose a tax.

Nor does the mere fact that the payments to the respondent are to be made periodically at semi-annual intervals make them income. If A owes B $10,000 and agrees to repay B $1,000 a year until the obligation is satisfied, B may or may not realize income upon the receipt of those payments, depending upon the nature of his claim. If it is a claim for the repayment of borrowed money, his receipts are not income; but if it is a claim for services, his receipts are income. The mere fact that payment of A's obligation is made in instalments rather than in a lump sum does not change the character of the moneys received by B for the purposes of taxation. In the case at bar the executors have the power to commute the annuities by paying to each annuitant a lump sum representing the present value of each annuity computed by reference to mortality tables. *Buchanan* v. *Little*, 154 N. Y. 147, 152; *People's Trust Co.* v. *Flynn*, 188 N. Y. 385, 393. And the annuitants had the right to demand the payment of such value in a lump sum. *Reid* v. *Brown*, 54 Misc. 481; *Matter of Cole*, 174 App. Div. 534, aff'd 219 N. Y. 435; *Bertuch's Will*, 225 App. Div. 773. If the respondent's annuity had been paid to her in a lump

sum, that sum would not have been taxable to her any more than any other general legacy would be taxable to her.

The Government's position leads inevitably to the rather unique conclusion that a testamentary annuity, such as the one at bar, may be partly taxable and partly nontaxable in the same year, or may be taxable in one year and not taxable in another year, depending upon whether the payments were made out of the income of the estate or out of the corpus of the estate. This is well illustrated by the case of another annuitant under this will, *Appeal of Isaac Bell*, now pending before the Board of Tax Appeals, wherein for the year 1922 Bell's annuity of $30,000 was paid partly out of income and partly out of corpus and the tax was asserted against him on account of the annuity only to the extent that it was paid out of income. If the Government is right, then in the instant case, where the income of the estate may be used for the purposes of the Home, the taxability or non-taxability of the payments to the respondent will depend upon the number of indigent newspapermen who are in need of assistance and who are given assistance by the Home in any particular year.

The Government was not compelled to take so tenuous a position in *Irwin* v. *Gavit*, 268 U. S. 161 and in *Heiner* v. *Beatty*, 17 Fed. (2d) 743, affirmed *per curiam*, 276 U. S. 598. Both of those cases involved trusts created under specific direction of the testator. The income flowing from the corpus of those trusts and paid over to the beneficiaries as income each year was either wholly taxable to the recipient, or else income intended by Congress to be taxed would entirely escape taxation. That is not true here. (See *post*, pp. 25-27.) As the Court below said (R. 41):

> "But in the instant case we are dealing with a bequest of a sum certain, payable during the life of the legatee, from the corpus of the estate, unless of course income be available for such payment, as pending development of needs of the home there was. How long such income will be thus available is entirely uncertain. It would seem anomalous to tax such annuities as income of the

> recipient one year and not permanently. Apparently the Government made no attempt to tax them for the two years when actually paid from the corpus of the estate."

The Government has not always maintained that a payment is income if made out of income, nor that payments are income if made in instalments rather than in a lump sum. In two cases before the Board of Tax Appeals it maintained that under the Revenue Acts of 1918 and 1921 an executor who, during the period of administration, makes payments out of the income of the estate to general legatees on account of their legacies, may not deduct such payments from gross income in the return of the estate, and the Board so held. *Heywood* v. *Commissioner*, 11 B. T. A. 29; *Tyler v. Commisioner*, 9 B. T. A. 255. It follows from these decisions that the legatees are not taxable on the moneys that were paid to them out of the income of the estate, for the Revenue Acts do not impose a tax upon the recipient of payments out of income of an estate except in cases where the payment is deductible by the executor in the return of the estate. The decisions in the *Tyler* and *Heywood* cases sustaining the Government are undoubtedly sound, for the Board recognized that a payment is not taxable to the recipient merely because it was made out of income, and it also recognized that a payment out of the income of an estate to a legatee on account of his legacy is not income to the legatee. As a legatee under the will of James Gordon Bennett the respondent is in precisely the same position as the legatees in the *Tyler* and *Heywood* cases.

II.

The annuity payments to the respondent constitute property acquired by gift or bequest within the meaning of Section 213(b) (3) of the Revenue Act of 1921; they do not constitute taxable income to her within the meaning of Section 219(d) of the Revenue Act of 1921.

Section 213(a) of the Revenue Act of 1921 defines in all inclusive terms what constitutes gross income. Section 213(b) then provides:

> "That for the purposes of this title * * * the term 'gross income'—
>
> * * * * * * *
>
> "Does not include the following items, which shall be exempt from taxation under this title:
>
> * * * * * * *
>
> "(3) The value of property acquired by gift, bequest, devise or descent (but the income from such property shall be included in gross income)."

Undoubtedly the words "gift" and "bequest" as used in Section 213(b) include a testamentary annuity such as the annuity of the respondent in the case at bar. See *United States* v. *Merriam*, 263 U. S. 179, 184. The decisions of this Court in *Irwin* v. *Gavit*, *supra*, and *Beatty* v. *Heiner*, *supra*, have established that the term "bequest" in Section 213(b) does not include either a bequest of income or income from a bequest. As we have pointed out, the respondent, under a proper construction of the testator's will and under the law of New York, does not take either a bequest of income or income from a bequest; what she takes is a general legacy of $5000 a year charged upon and payable out of the residuary estate as a whole, with no preferential right to either income or principal. If, instead of giving her an annuity

of $5000 a year the testator had given her a legacy of $50,000, obviously the $50,000, when received by the legatee would not be taxable to her even if it had been paid in instalments and entirely out of the income of the estate. *Heywood* v. *Commissioner*, 11 B. T. A. 29; *Tyler* v. *Commissioner*, 9 B. T. A. 255. Or if her annuity were commuted by the payment of a lump sum, such sum would not be taxable income to her, regardless of the source from which it was paid. The fact that the respondent's legacy is being paid in semi-annual instalments during her life, instead of in a lump sum, does not make it taxable income so long as she was given no right to receive the income flowing from any particular property or fund, but was simply given a right to be paid out of the residuary estate.

In the *Gavit* case the taxpayer, as beneficiary, acquired by bequest a life interest in the specific trust *res* under the trust created at the direction of the testator, and he received the income flowing from that *res*. The bequest in that case was an equitable interest or estate in the corpus of the trust. See *Brown* v. *Fletcher*, 235 U. S. 589, 599. That interest or estate was not taxable as income, but the income arising from it was taxable.

In the *Beatty* case, affirmed *per curiam*, by this Court on the authority of *Irwin* v. *Gavit*, the Circuit Court of Appeals put its decision squarely on the ground that the provisions of the testator's will created "with no lack of certainty, out and out trusts", thus bringing the case within the four corners of the *Gavit* case. Speaking of the provisions in the will, the Circuit Court said (p. 744):

> "They provided a capital sum for each annuitant, directed that it be 'set apart' and 'held in trust' for him and that from the interest and income therefrom accruing payment of a definite sum be made to him semi-annually. Having all the earmarks of formal trusts, the executor and trustee, believing itself charged therewith, exercised the election given it to create capital trust funds by withdrawing from the body of the estate sufficient securities to produce the amounts to be paid annually to the more than forty annuitants."

No such provision appears in the Bennett will and no such action was either authorized or taken by the executors in the case at bar.

Matter of White v. *Gilchrist*, 214 App. Div. 153, cited at page 20 of the Government's brief, is in all essential respects similar to *Irwin* v. *Gavit* and *Beatty* v. *Heiner*. The testator in the *White* case directed that a trust be set up "to earn and produce an annual income of $10,000 which said amount my trustees are directed to annually pay to Mrs. Ida Josephine B. White, in equal quarterly payments" until she should die or remarry. The trustees did not actually set up the trust but paid the $10,000 per annum to Mrs. White out of the income of the estate. The Court held that those payments were taxable to her under the New York income tax law, the provisions of which are similar to the Federal law. The rights of Mrs. White in that case, unlike the rights of the respondent herein, were similar to the rights of the beneficiaries in the *Gavit* and *Heiner* cases, and they were not altered by the failure of the trustees to carry out the testator's direction. Under the will, Mrs. White acquired a right to receive income as such from the date of the testator's death. *Matter of Stanfield*, 135 N. Y. 292, 295. The Court in the *White* case said, at page 155:

> "The mere fact that the executors and trustees have not obeyed the will of the testator by setting apart the trust fund directed by the will does not change the character of the thing received by the petitioner."

We repeat that in the case at bar the will creates no trust, the executors established no trust, the respondent has no right under the will to income as such, and the payments she receives are payments on account of her legacy and are nothing more nor less than property acquired by bequest within the meaning of Section 213(b) (3).

Notwithstanding the use of the word "exempt" in Section 213(b), it is not a provision for exemption to be strictly construed against the taxpayer, as the Government contends

in its brief at page 13. The provision merely defines what is not taxable income, and is to be liberally construed in favor of the taxpayer. *United States* v. *Merriam*, 263 U. S. 179, 188; *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189, 194. In the *Supplee-Biddle* case, this Court said, at page 194:

> "Nor do we find any difficulty with the expression in paragraph (b) which *exempts* proceeds of life insurance from gross income. The word is used not to indicate that they would be otherwise included in the income to be taxed, but only to make clear that the gross does not include them."

We turn now to Section 219, which is in *pari materia* with Section 213(b) (3) and should be construed together with it. The pertinent provisions of Section 219 appear in its subdivisions (c) and (d). Subdivision (c) provides that in the case of income received by estates of deceased persons during the period of administration,

> "the tax shall be imposed upon the net income of the estate * * * and shall be paid by the fiduciary, except that in determining the net income of the estate * * * there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary."

Subdivision (d) provides that in the case of any income permitted by subdivision (c) to be deducted,

> "the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate * * * for its taxable year which, pursuant to the instrument or order governing the distribution is distributable to such beneficiary, whether distributed or not * * *."

The foregoing provisions express the purpose of the Act to tax decedents' estates as entities separate and distinct from the persons who take under the will or by intestacy. They, however, indicate an exception to this general purpose, namely, to tax to legatees, heirs and beneficiaries, income

which is required by the terms of the will to be distributed to such persons. In respect of such income the personal representative may take a deduction on the return filed for the estate but the person to whom the income is distributable must pay the tax thereon. The only rational construction of Section 219 is that the executor may deduct and the legatee is required to pay tax upon only the amounts of income that are distributed or distributable as income under the terms of the will. No other possible construction suggests itself when these provisions are read in the light of the provisions of Section 213(b)(3) which exclude from taxable income "the value of property acquired by gift, bequest, devise or descent." An income tax cannot be imposed upon a legacy or a sum of money not directed to be paid to the legatee as income without nullifying the provisions of that section. As the Board of Tax Appeals in its opinion below said (R. 20, 21):

> "We have for application sections 213 and 219 of the revenue act of 1921. It is only by a strained construction that we can by any possible means arrive at the conclusion that these annuities are taxable under section 219, to the petitioners, as distributive income. On the other hand, section 213 grants an exemption in cases of bequests. There is no doubt that each of these annuities is a bequest and there is no doubt that none of them is made payable by the will of James Gordon Bennett out of income. To hold that the mere fact that in the taxable years involved, the annuities were paid out of income and therefore were distributive income to the recipients, would give a construction to the taxing statute far beyond the meaning of the words used. When we are compelled to choose between clear words of exemption and a strained construction of a taxing provision, we accept that which is clear rather than that which involves doubt."

Although the Government says that Sections 219 and 213(b)(3) are in *pari materia* and "must necessarily be construed together," the conclusion it reaches with respect to the

construction of Section 219 can only be reached by completely ignoring the provisions of Section 213(b)(3). At page 16 it makes the unqualified statement that "so far as the beneficiary [here, the legatee] is concerned, the test of taxability under this section is whether there is distributable to him net income of an estate or trust." This is a fatally incomplete statement. To it must be added the words "as income". Otherwise the mere employment of income by an executor to pay any charge upon the estate would make the payment income to the payee and a deduction to the executor. For example, a bequest of $10,000 would be income to the legatee if paid from income and Section 213(b) (3) would be rendered meaningless.

It is not uncommon for an executor to pay general legacies out of income which has not been otherwise disposed of under the will. Indeed, in discharging their obligations, it is the practice of executors to exhaust current income before dipping into the corpus. Such income, not otherwise disposed of by the testator, is available for distribution to legatees on account of the principal amount of their legacies, just as the corpus of the estate is available for that purpose. Suppose, for example, that a testator leaves a legacy of $10,000 to A, a legacy of $10,000 to B and the residue of his estate to C, and that before the close of the period of administration the executor, having made provision for the payment of all debts, finds that there is available $5,000 of income which has been earned by the estate since the testator's death. Suppose, further, that the executor pays $5,000 to A and $5,000 to B on account of their legacies, the payment to A being made out of income and the payment to B being made out of corpus. Under the Government's construction of Section 219, A pays an income tax on his $5,000 while B does not. Such a conclusion, we submit, is absurd.

Under a proper construction of Section 219, the tax upon the $5,000 distributed to A would be payable not by A, but by the executor. That is precisely what the Government contended in *Heywood* v. *Commissioner*, 11 B. T. A. 29 and in

Tyler v. *Commissioner*, 9 B. T. A. 255, and the Board of Tax Appeals properly sustained the Government's contention. Neither of those cases was taken up on appeal and presumably the Department is applying the construction therein established in examining the returns of estates.

But where, as here, the Government is dealing with a legatee, it adopts a different construction of Section 219, exacting from the legatee the tax upon the amount paid to him on account of his legacy. In support of this construction the Government, at page 16, cites *Riker* v. *Commissioner* (C. C. A. 2d), 42 F. (2d) 150, a case which is clearly distinguishable from the case at bar.

In the *Riker* case the executor in 1923 made payments out of the income of the estate to a residuary legatee and the Court held that such payments were taxable to the legatee and not deductible by the executor. Although the report does not indicate whether the payments were made prior or subsequent to the expiration of the first year of administration, we have ascertained by an examination of the record in that case that letters testamentary were issued to the executor on October 27, 1921, and that the statutory period of administration of the estate expired on October 27, 1922, prior to the time when the payments in question were made to the residuary legatee. Under the law of New York, which apparently governs the legatee's rights, his right to receive income as such on his legacy arose at the close of the first year of administration. *Matter of Lord*, 134 Misc. 198, affirmed 228 App. Div. 771; *Matter of Benson*, 96 N. Y. 499. In the case at bar the respondent, as an annuitant, has no right to receive income as such.

In the brief filed by the Government in the *Riker* case in the Circuit Court of Appeals, the following is said with reference to the case at bar as decided by the Court below:

> "That case is to be readily distinguished from the instant one. The facts are that an annuity was bequeathed to the taxpayer. During the years in question the annuity was paid out of income, but as expressed by the

court (p. 8319), 'the actual payment of the appellee's annuity from income was merely an incident, probably temporary, of the administration of the estate; it might almost be called an accident.' The court in that case expressly distinguishes it from *Irwin* v. *Gavit*, *supra*, in which the annuity specifically had to be paid from income and not from the corpus. The court rests its decision upon that distinction. Thus, while an annuity payable from the corpus is within the ambit of Section 213 (b) (3) and not subject to tax, one which is payable from income of the estate or trust is considered 'the income from such property' within the terms of the exception to that subdivision of the statute, and consequently subject to tax."

Running through the Government's brief is the suggestion that if the payments in question are not taxed to the respondent, then so much income has escaped taxation. This is not true. When the executor paid these annuities out of income he was not entitled to take a deduction from income of that amount because he did not distribute income as such but merely paid a part of a general bequest. Therefore, all of the income realized by the estate in 1921 was taxable to the executor under Section 219, *unless because of other provisions of the statute it was exempted*. It so happens in this case that all of the estate with its increments, not paid to other legatees is held for the Home Corporation which is an exempt organization under Section 231 (6) (*post*, p. 32) and for that reason the income happens not to be subject to taxation in the hands of the executor. In other words, the income from the securities set apart for the Home is excluded from taxation, not because the respondent and the other annuitants are not subject to taxation on the annuity payments, but solely because Congress under other provisions of the law has seen fit to exempt from taxation the income of charitable organizations.

In *United States* v. *Bolster*, 26 F. (2nd) 760, (C. C. A. 1st) the testator bequeathed to his wife the net income of a trust, in lieu of dower, the trust corpus being permanently

set aside for the benefit of charitable institutions. The Court held that because the wife elected to take the income in lieu of dower she was a purchaser for value and what she received constituted a return of capital, not taxable income. The Government in that case argued, as it does here, that if the wife was not subjected to an income tax on the payments she received, so much income would escape taxation altogether. The Court said (p. 763):

> "In the instant case we do not have to consider the possibility of the government losing its rightful tax upon income which Congress intended should be taxed. It is not a question of a statute 'failing to hit' something which ought to be taxed. Under the statute with which we are dealing a trust is the subject of taxation just as an individual. We think the government must look to the trustee for its tax, and that the trust would clearly be taxable upon this income, if it were not expressly exempted because of its charitable character."

But the Government, apparently recognizing that no income *escapes* taxation in the case at bar because the Home corporation is a charity, goes further, and says at page 22 that "the practical effect of the decision below is to enable income of an estate which arises from non-exempt sources to escape taxation". This is entirely erroneous. As we have pointed out, the Government taxes to the estate all income without allowing any deduction for payments of legacies out of income. *Heywood* v. *Commissioner, supra; Tyler* v. *Commissioner, supra.* Obviously, Section 219 permits the estate to deduct only that income paid over to legatees which is properly taxable to them, and prohibits the deduction otherwise Therefore there is no basis whatever for the assertion that the effect of the decision below is as claimed by the Government.

In *Irwin* v. *Gavit* and *Beatty* v. *Heiner* the funds received by Gavit and Beatty were distributions of income *as income* pursuant to the terms of the wills; the trustees were clearly permitted under Section 219 to deduct the sums so distrib-

uted, and, so far as Section 219 was material in those cases, its effect was to make the payments taxable to the beneficiaries. Consequently, failure to tax the recipients would have resulted in the escape from tax of income when the statute contemplated taxing all income not specifically exempted. On the other hand, in the case at bar, the annuities, not being limited to the income of the estate, but being sums payable in any event and constituting charges on the estate as a whole, are not distributions of income *as income* under the terms of the will, and therefore are neither taxable to the annuitants nor deductible by the estate under Section 219.

III.

The taxation of the respondent's annuity as income would result in double taxation not intended by Congress.

James Gordon Bennett died on May 24, 1918 (R. 10) and there was imposed by Section 201 of the Revenue Act of 1916, as amended by Section 300 of the Revenue Act of 1917, an estate tax based upon the value of his net estate. The value of the net estate, as provided in Section 203 of the Revenue Act of 1916, retroactively amended by Section 403(a) (3) of the Revenue Act of 1918, is the value of the entire estate less certain allowable expenses, a specific exemption and the value of bequests to charitable or other exempt organizations. Where, as in the case at bar, the residuary legatee is a charitable organization, the value of the net taxable estate must be and is in fact determined by ascertaining the value of all of the non-exempt bequests and devises. *Edwards* v. *Slocum*, 287 Fed. 651; affd. 264 U. S. 61. Consequently, the testator having provided for the payment of annuities as a charge upon his entire estate and having bequeathed the residue to a charitable organization, the value of the net taxable estate must be determined by

finding the value of the annuities as of the date of death. It is a matter of common knowledge that the present value of annuities is determined by discounting at a certain rate of discount the present worth of the annual payments over the life expectancy of the annuitant, and such expectancy is determined by the use of mortality tables. We refer to the provisions of Article 15 of Treasury Regulations 63 as illustrating that this method of valuing annuities is used by the Department.

Under the statutes providing for a tax upon the value of the net estate, a tax was imposable upon the value of the anticipated annuity payments. Notwithstanding this, however, the Government proposes to impose in addition an income tax upon the annual payments when they are received. This is double taxation and is not to be permitted unless expressly required by statute. It would indeed be an anomalous situation if the Federal Government, after imposing an estate or inheritance tax on the value of these annual payments as *corpus* passing at death, is permitted to impose also an income tax upon the theory that the payments are not *corpus* but are *income*. *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189; *Nichols* v. *United States*, 64 Ct. Cls. 241; certiorari denied, 277 U. S. 584. Yet, that is precisely what the Government is now attempting to do. Referring to a situation in all respects similar, which arose under the Revenue Act of 1918, this Court in the *Supplee-Biddle* case, at page 195, said:

> "The result of the construction put by the Government upon Sections 233, 230 and 213 would be to impose a double tax on the proceeds of the two policies in this case over and above $40,000, i. e., an income tax and an estate tax. Such a duplication even in an exigent war tax measure *is to be avoided unless required by express words.*" (Italics ours.)

In the *Gavit* and *Beatty* cases there was no double taxation. The estate tax did not apply to the income received by Gavit and Beatty, because the tax was imposed only

upon the corpus of the trusts from which their income arose. Here, the estate tax is measured by the value of the anticipated annuity payments and an income tax is sought to be imposed upon the amount of such payments when received.

Respondent argued below that, in any event, no taxable income could be realized by this annuitant until the value of her bequest, which must be excluded from gross income, has been recovered through the annuity payments. This alternative position of the respondent was not considered by the Court below. The Government, at pages 22-24 inclusive, disputes the merit of such an argument by asserting that one who takes an annuity as a volunteer may not be likened to one who has purchased an annuity and by reiterating its fundamental error that respondent's annuity is taxable because it was paid from the income of the estate, again completely ignoring the provisions of Section 213 (b) (3).

CONCLUSION.

In accordance with the foregoing, it is respectfully submitted that the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

JOHN W. DAVIS,
SPOTSWOOD D. BOWERS,
15 Broad Street,
New York City,
Attorneys for Respondent.

MARSDEN B. CANDLER,
Of Counsel.

APPENDIX.

The Statutes Involved.

Section 213 of the Revenue Act of 1921 (c. 136, sec. 213, 42 Stat. 237-8) provides in part:

"That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme Court and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whateyer form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items (except as provided in subdivision (e) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer, unless under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; but

"(b) Does not include the following items, which shall be exempt from taxation under this title:

* * * * * * *

"(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income) * * *"

Section 219 of the Revenue Act of 1921 (c. 136, sec. 219, 42 Stat. 246-7) provides in part:

"(a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust including—

"(1) Income received by estates of deceased persons during the period of administration or settlement of the estate; * * *

"(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

* * * * * * *

"(c) In cases under paragraphs (1), (2), or (3) of subdivision (a) or in any other case within subdivision (a) of this section, except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

"(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing the net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary."

* * * * * * *

Section 231 of the Revenue Act of 1921 (c. 136, sec. 231, 42 Stat. 253) provides in part:

> "That the following organizations shall be exempt from taxation under this title—
>
> * * * * * * * *
>
> (6) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; * * *"

Section 201 of the Revenue Act of 1916 (c. 463, sec. 201, 39 Stat. 777) provides in part:

> "That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States: * * *"

Section 300 of the Revenue Act of 1917 (c. 159 sec. 300, 39 Stat. 1002) provides in part:

> "That section two hundred and one, Title II, of the Act entitled 'An Act to increase the revenue, and for other purposes,' approved September eighth, nineteen hundred and sixteen, be, and the same is hereby, amended to read as follows:
>
> 'Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in, section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States: * * *"

Section 403 of the Revenue Act of 1918 (c. 18, sec. 403, 40 Stat. 1098) provides in part:

"That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

* * * * * * * *

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; * * *"